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NO. 88-680

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

CLIFFORD Y. C. LAI and VICTORIA L. LAI,
Petitioners,

vs.

CITY AND COUNTY OF HONOLULU,
a Municipal Corporation,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT CITY AND COUNTY OF HONOLULU IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE NINTH CIRCUIT PROPERLY APPLIED THIS COURT'S DECISIONS IN HOLDING THAT PETITIONERS DID NOT YET HAVE A JUSTICIABLE CLAIM.

II. WHETHER PETITIONERS' ARGUMENTS CONCERNING ALTERNATIVE RULINGS OR DISPOSITION OF THE CASE BY THE NINTH CIRCUIT ARE INAPPROPRIATE.

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BRIEF OF RESPONDENT CITY AND COUNTY OF HONOLULU IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

I.

NATURE OF THE CASE

This case involves a claim of inverse condemnation by Petitioners Clifford Y. C. Lai and Victoria L. Lai (hereinafter "Petitioners" or "Lais") against Respondent the City and County of Honolulu (hereinafter "Respondent" or "City").

The property involved and allegedly "taken" encompasses an area of approximately 30,000 square feet and contains a multi-story building and some duplexes aggregating a total of 25 residential units which are fully rented and occupied. The subject property has been included in the Punchbowl Historic, Scenic and Cultural District. As such, it is subject to various height restrictions and development controls. The Lais allege that since they are prohibited from erecting a 13-story structure due to the provisions of the Ordinance, the City "took" the entire property without compensation.

The Ninth Circuit Court of Appeals in its decision, which is the subject of Petitioners' Writ, determined succinctly and correctly after a detailed and lengthy briefing process that the Lais did not yet have a justiciable claim as their action was not ripe for adjudication. Accordingly, the federal court had no jurisdiction to consider the matter.

II.

STATEMENT OF FACTS

1. The subject parcel of land is located at 1114 Lunalilo Street, Honolulu, Hawaii. This parcel is identified as Tax Map Key No. 2-4-19-41 containing approximately 30,000 square feet.

2. Petitioners purchased a leasehold interest in the subject property in 1971 for $300,000. In 1975, this amount was discounted by the seller to $240,000. In 1976, they received at least three offers to purchase their leasehold interest, one for cash and two in the form of agreements of sale. These latter offers were in the amounts of $475,000 and $520,000, respectively. Notwithstanding the fact that Petitioners were actively seeking a buyer at an asking price of approximately $500,000, all of these offers were summarily rejected because they were allegedly "too low" and not "high enough."

3. The subject property contains 25 residential units which are fully rented and occupied. As indicated by Petitioners' own data sheet, these units have produced a positive cash flow, not including depreciation and tax write-offs in six out of twelve years, totaling about a $25,000 profit.

4. It is the uncontroverted testimony of Petitioners' own expert witness that the property is capable of sustaining a 51-unit residential development, which would comply with the provisions of the challenged ordinance.

5. Respondent is the City and County of Honolulu which is a municipal corporation of the State of Hawaii and is invested with the right, power and capacity to zone and take property for public purpose.

6. In 1975, the City enacted Ordinance No. 4488 which established the Historic, Cultural and Scenic District No. 3, the Punchbowl District, in accordance with Article 12 of the Comprehensive Zoning Code, Amended Ordinance No. 4319. Ordinance No. 4488, among other things, set forth the purpose, regulations and requirements of various projects within the area. The proposed intent of Ordinance No. 4488 was the preservation and enhancement of the natural setting and unique character of Punchbowl National Cemetery and its surrounding areas. This resulted in a 40/25-foot height restriction being designated on Petitioners' property.

7. In 1978, the City enacted Ordinance No. 78-89 which amended and superseded Ordinance No. 4488 extending the Historic, Cultural and Scenic District No. 3, the Punchbowl District, as well as limiting the height to 25 feet.

8. In February 1976, Bok Say Kim, Henry I. H. Kim, Patricia D. Kim and Rose H. Y. Kim, then landowners, through Andrew Aiu and Real Estate Swingers, submitted a Design Evaluation and Certificate of Appropriateness to the City Department of Land Utilization (hereinafter "DLU"). These documents sought approval of plans for a 13-story apartment building with 104 units and 120 parking stalls. Clearly, Petitioners were not involved in this as of this time. Prior to the enactment of Ordinance Nos. 4488 and

78-89, a two-story building consisting of approximately 25 units and some duplexes was located on Petitioners' property. This building still exists today.

9. On February 6, 1976, Andrew Aiu and Real Estate Swingers' application for a Certificate of Appropriateness was received by DLU. A public hearing on the proposed development was held on July 21, 1976 at which time public testimony supporting the application was presented only by the applicants' attorney and an attorney representing the lessee.

10. Following a review, the recommendation was made by the Director of DLU that the application be denied. Reasons for the denial were as follows: 1) substantial diminishing of major public views of Punchbowl; 2) development would not achieve any public objective of equal or greater importance; 3) building would be excessively massive and bulky; 4) the wall area would be approximately 350 percent larger than that permitted by Ordinance No. 4488; 5) the texture and architectural appearance would not be compatible with the existing character of the area; 6) less than ten percent of the flat roof area is devoted to acceptable landscape/architectural treatment (under Ordinance No. 4488, 20 percent is required); 7) the proposed development does not provide sufficient open space on the ground level; and 8) the proposed 13-story building would be incompatible with the one- to three-story buildings which immediately surrounds the property.

11. On September 15, 1976, the Certificate of Appropriateness was recommended for denial by the Planning and Zoning Committee of the City Council based upon the recommendation of the Director of DLU and the Planning Commission.

12. On September 14, 1978, Petitioners filed an action against the City in the District Court under 42 U.S.C. Section 1983.

13. On February 13, 1980, the City filed a Motion for Partial Summary Judgment alleging that the action is barred by the statute of limitations. That motion was denied by the District Court by its Order dated June 13, 1980.

14. Petitioners thereafter filed an Amended Complaint on December 16, 1981. The Amended Complaint requested that they (Petitioners) be awarded just compensation for the entire parcel as it was allegedly taken by reason of Petitioners' inability to fully develop their property.

15. On January 12, 1982, the City answered the Amended Complaint denying that a "taking" of Petitioners' property rights occurred and contending that the two-year statute of limitations had run.

16. On November 3, 1982, a nonjury trial was held before the District Court on Petitioners' claim that their inability to develop their property in a similar manner as the surrounding area had been developed constituted a taking. On May 18, 1983, the District Court entered its Findings of Fact and Conclusions of Law in this matter, concluding that the Complaint was not timely filed and thereby dismissed the action.

17. Petitioners, pursuant to Rules 8, 12, 52 and 59, Federal Rules of Civil Procedure (hereinafter "FRCP"), filed a Motion to Amend the Findings of Fact and Conclusions of Law, or, Alternatively, for a New Trial on May 31, 1983. The District Court, by Order dated December 14, 1983, denied this motion.

18. Petitioners, pursuant to Rules 8, 12, 52, 59 and 60, FRCP, filed a Motion to Reconsider Order Denying Motion to Amend the Findings of Fact and Conclusions of Law, or, Alternatively, for a New Trial, which was denied by Order dated January 4, 1984. Petitioners, pursuant to Rule 4, Federal Rules of Appellate Procedure (hereinafter "FRAP"), and 28 U.S.C. Section 1291, filed a Notice of Appeal on February 6, 1984, appealing this order. On December 14, 1984, the United States Court of Appeals for the Ninth Circuit reversed and remanded the District Court's Order

on the grounds that the District Court applied the incorrect statute of limitations. Subsequently, the District Court on February 21, 1985, reversed and remanded this decision.

19. On December 9, 1985, Petitioners filed a Notice of Motion to Assess Attorney's Fees and Costs against the City, pursuant to 42 U.S.C. Section 1988. The District Magistrate heard Petitioners' motion on February 6, 1986, and on November 13, 1986 made a Report and Recommendation on this matter. On December 26, 1986, the District Court by order adopted and modified the Magistrate's Report and Recommendation.

20. Based upon the District Court's Findings of Fact and Conclusions of Law filed on March 21, 1986 and Order filed January 9, 1987, a judgment was entered in favor of Petitioners against the City in the amount of $657,437.12 on January 9, 1987. On February 5, 1987, the City filed its Notice of Appeal pursuant to 28 U.S.C. Section 1291 and Rule 4, FRAP, to include the Order and Judgment entered on January 9, 1987.

21. Argument before the Ninth Circuit Court of Appeals was held on January 15, 1988. The decision of the Ninth Circuit was rendered on March 7, 1988. The Judgment of the United States District Court for the District of Hawaii was filed on August 9, 1988.

III.

ISSUES

A. The Ninth Circuit Properly Applied This Court's Decisions In Holding That The Lais Did Not Yet Have A Justiciable Claim.

This Court has made it clear that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the

property at issue."*Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 186, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985); *MacDonald, Sommer and Frates v. County of Yolo*, 477 U.S. 340, 106 S. Ct. 2561, 91 L. Ed. 2d 285 (1986). The government decision is not final and not judicially reviewable until the "decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury;...." *Williamson County*, 473 U.S. at 193. In this regard, this Court has established two ripeness thresholds.

First, the property owner must submit a plan of development for the property under existing land use regulations to show if the invasion of its property rights is of sufficient magnitude to have denied the owner the "justice and fairness" guarantee by the Constitution. *Agins v. Tiburon*, 447 U.S. 225, 260, 263, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980). If he is denied approval of the most lucrative or intensive plan under the current regulations, the property owner must then seek approval of another plan or plans that would enable that owner to derive economic benefit from the property. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631, *reh'g denied*, 439 U.S. 883, 99 S. Ct. 226, 58 L. Ed. 2d 198 (1978).

Second, if administrative relief such as a variance or waiver of the current regulations is available, the property owner must seek such relief to minimize the economic impact of the challenged action and its interference with the owner's investment-backed expectations. *Williamson County*, 473 U.S. at 191; *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264, 297, 101 S. Ct. 2352, 69 L. Ed. 2d 1, 29 (1981).

These two thresholds must be reached before a property owner may seek judicial resolution of a claimed taking. *Williamson County*, 473 U.S. at 187-90. If a regulation goes "too far," it may effect a taking or be an invalid exercise of the police power. Determining whether a regulation has gone "too far" requires judicial inquiry into the "economic

impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations."473 U.S. at 191. As this Court said in *Williamson County:*

> Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.

Id.

A court simply cannot determine if the challenged regulations go "too far" until the local government has had the opportunity to decide how it will apply those land use controls to the petitioner. In this regard, the Ninth Circuit Court of Appeals correctly concluded that the lower court would be unable to make such a determination simply because an initial application for development had been denied.

Reaffirming the principles of *Williamson County,* this Court held in *MacDonald v. County of Yolo* that it was unable to determine whether a taking had in fact occurred. In that case, although the developers' initial proposal had been rejected, they had not received a "final definitive position" from the zoning board, leaving open the possibility that some development would be permitted. *MacDonald v. County of Yolo,* 477 U.S. at 351. This Court stressed that:

> Rejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews.

Id. at 353, n.9.

By Petitioners' own admission, a 51-unit residential development on the property would be permitted that would conform to all zoning requirements and restrictions. A proposal for such a development, however, has never been submitted to the City.

In this respect, Petitioners clearly misunderstand the crucial rationale of the finality requirement: A court simply cannot evaluate a regulatory takings claim until plaintiffs have received a final and authoritative determination of the type and intensity of development legally permitted on the subject property. *MacDonald v. County of Yolo*, 477 U.S. at 351 (quoting *Williamson County*, 473 U.S. 172, 87 L. Ed. 2d 126, 105 S. Ct. 3108). As *Agins v. Tiburon, Williamson County* and *MacDonald v. County of Yolo* make clear, there is as yet simply no "concrete controversy regarding the application of the specific zoning provisions." *Agins v. Tiburon*, 447 U.S. at 260.

Further, because Petitioners have made no attempt to alter their initial development proposal does not necessarily mean that the land has no reasonable beneficial uses left or that Petitioners have been denied all reasonable economic value from their land. *MacDonald v. County of Yolo*, 477 U.S. at 347. And if economically viable uses are in the final analysis not permitted by the current land use restrictions, then it would, as the Ninth Circuit Court of Appeals correctly concluded, be incumbent upon the Petitioners to seek variances from those regulations. Variances are available pursuant to Section 6-909 of the Revised Charter of the City and County of Honolulu 1973, as amended.

As stated by this Court in *Williamson County:*

> [I]t is impossible to determine the extent of the loss or interference until the Commission has decided whether it will grant a variance from the application of the regulations.

Williamson County, 473 U.S. at 191, n.12. Moreover, this Court has made clear that mere allegations or opinions by the developer that it has "done everything possible," or that requests for a variance or other relief would be futile will not suffice. *Williamson County*, 473 U.S. at 188, cf. *MacDonald v. County of Yolo*, 477 U.S. at 352, n.8.

Finally, if Petitioners see fit, as *Williamson County* requires them to do, to submit alternate development approvals and any needed variances, "a mutually acceptable solution might well be reached . . . obviating any need to address constitutional questions." *See Williamson County,* 473 U.S. at 187 (quoting *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.,* 452 U.S. 264 at 297)

For whatever reason, however, Petitioners have chosen to skirt the administrative process, choosing instead to bring a premature action without giving the City the opportunity *Williamson County* requires to reach an agreement and make a final decision. Accordingly, the Ninth Circuit Court of Appeals decision correctly recognizes this Court's finality requirements.

B. The Lais' Arguments Concerning Alternative Rulings Or Disposition Of The Case By The Ninth Circuit Are Inappropriate.

This Court has consistently held that unless a claim is ripe, there is no jurisdiction to hear it. *See United Public Workers of America v. Mitchell,* 330 U.S. 75, 89-91, 91 L. Ed. 754 (1947); and Hart and Wechsler's, *The Federal Courts and the Federal System* at 145-46 (2d ed. 1973). Accordingly, because the finality requirements enunciated in this Court's holdings in *Williamson County* and *MacDonald v. County of Yolo* have not been satisfied, the Ninth Circuit properly concluded that the Petitioners did not yet have a justiciable claim. Absent jurisdiction and a justiciable claim, the Petitioners reliance and suggestion of alternative rulings or disposition of the case are clearly misplaced and inapplicable.

IV.

CONCLUSION

Petitioners have failed to show that the Ninth Circuit Court's decision in this above-entitled case is in conflict with the Opinions of this Court. In addition, Petitioners have not shown that alternative rulings or disposition of this case would be applicable absent the presence of a justiciable claim. for the foregoing reasons, the City respectfully requests this Court to deny the Petition for Writ of Certiorari.

DATED: Honolulu, Hawaii, November 18, 1988.

Respectfully submitted,

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APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CLIFFORD Y.C. LAI and VICTORIA L. LAI,
Plaintiffs-Appellees,
v.
CITY AND COUNTY OF HONOLULU, a municipal corporation,
Defendant-Appellant.

No. 87-1689
D.C. No. CV-78-0355-SPK
OPINION

Appeal from the United States District Court
for the District of Hawaii
Samuel P. King, District Judge, Presiding

Argued and Submitted
January 15, 1988—San Francisco, California

Filed March 7, 1988

Before: Otto R. Skopil, Jr. and Mary M. Schroeder, and Ruggero J. Aldisert,* Circuit Judges.

Opinion by Judge Schroeder

SUMMARY

Constitutional Law

Appeal from judgment finding a scenic easement ordinance a taking. Reversed and vacated.

*Honorable Ruggero J. Aldisert, Senior U.S. Circuit Judge for the Third Circuit, sitting by designation.

The court held that appellees' claim is not ripe for failure to seek variance of scenic easement ordinance.

In 1971, appellants the Lais purchased their interest in a lot located near the Punchbowl Crater. In 1974, the Lais entered into an arrangement with a developer, who planned to build condominiums in conformance with the then existing zone height limit. In 1975, appellant City of Honolulu enacted an ordinance establishing a scenic easement to protect one view of the Crater. The ordinance therefore restricted construction height. In 1976, the Lais's developer applied for, but was denied, a Certificate of Appropriateness to build. The Lais sued, challenging the scenic easement imposed upon their property as a taking without just compensation.

[1] A height limitation preserving the public's scenic view is not a taking. [2] As to the merits of appellees' other taking theories, they must pursue all avenues of relief before presenting a taking claim in federal court.

COUNSEL

Ronald B. Mun, Honolulu, Hawaii, for the defendant-appellant.

David Bettencourt, Honolulu, Hawaii, for the plaintiffs-appellees.

OPINION

SCHROEDER, Circuit Judge:

The City and County of Honolulu appeal the district court's money judgment in favor of the Lais in an inverse condemnation action. In 1975, the City enacted a zoning

ordinance, placing restrictions within a designated area on construction more than twenty-five feet above ground level. The purpose was to protect the view of the Punchbowl Crater from the H-1 Freeway. The Lais, owners of a development lease, were denied a Certificate of Appropriateness for their proposed high-rise condominiums due to the zoning ordinance. The Lais sued the City, contending that the ordinance constituted a compensable "taking" of their property, and won a judgment in their favor in the district court. We reverse and remand to the district court with instructions to dismiss because the plaintiffs have no "taking" claim which is yet ripe.

In 1971, the Lais purchased their leasehold interest in a 30,000 square foot lot with rental units in Honolulu. The property is located near the Punchbowl Crater, a historic and scenic attraction. In 1974, the Lais entered into an arrangement with a developer, who planned to build condominium apartments in conformance with the existing zoning height limitation of 350 feet.

In 1975, the City of Honolulu enacted Ordinance Number 4488, establishing the Punchbowl District as Historic, Cultural and Scenic District Number 3. The City's expressed purpose in enacting the ordinance was to establish a scenic easement to protect one view of the Punchbowl Crater from the H-1 Freeway. The ordinance therefore restricted construction more than twenty-five feet above ground level.

In 1976, the Lais' developer requested a Certificate of Appropriateness from the Honolulu City Council to build its condominium apartments. The City Council voted to deny the developer's application, citing eight considerations including the proposed project's height.

On September 14, 1978, the Lais sued the City and County of Honolulu under the Civil Rights Act of 1871, 42 U.S.C. § 1983, challenging the scenic easement imposed upon their

property as a "taking" without just compensation and seeking damages. They also asserted alternative theories for compensation or equitable relief.

[1] The facts established at trial, as found by the district court, showed only that a scenic easement had diminished the value of the plaintiffs' property. However, the Supreme Court has specifically stated that its decisions sustaining land-use regulations that "are reasonably related to the promotion of the general welfare, uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking.' " *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 131, 98 S. Ct. 2646, 2662-63 (1978). The district court found that the Lais could build a 51-unit residential development on the property that would conform to the zoning requirements and restrictions. The inability to reap as great a profit as one might have absent the zoning restriction, does not equate with a "taking." *William C. Haas & Co. v. City and County of San Francisco*, 605 F.2d 1117, 1120-21 (9th Cir. 1979), *cert. denied*, 445 U.S. 928, 100 S. Ct. 1315 (1980). In its most recent pronouncement of last Term, the Supreme Court expressly stated that a height limitation preserving the public's scenic view is not a "taking." *Nollan v. California Coastal Commission*, 107 S. Ct. 3141, 3147-48 (1987). Plaintiffs in this case also alleged alternative "taking" theories which the district court did not reach.

[2] We cannot rule definitively on the merits of any of plaintiffs' theories, however, because the plaintiffs must pursue all avenues of relief before presenting a "taking" claim in federal court. Under *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S. Ct. 3108 (1985), a plaintiff's claim is not ripe until "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." This requires that the plaintiffs seek variances from the regulations. *Id.* at 186-88, 105 S. Ct. at 3117; *see also Lake Nacimiento Ranch Co. v. San Luis Obispo*

County, 830 F.2d 977, 980 (9th Cir. 1987); *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1453-54 (9th Cir.), *amended*, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 775 (1988). A plaintiff must also "seek compensation through the procedures the State has provided for doing so." *Hamilton Bank*, 473 U.S. at 194, 105 S. Ct. at 3121.

Here, although the parties agree that there are no state procedures for such compensation claims, the Lais did not seek a variance. Since both sides have pointed out to us on appeal that other exceptions to the ordinance's height restriction have been granted during the long course of this litigation, we must conclude that the Lais have not yet obtained a "final and authoritative determination of the type and intensity of development legally permitted on the subject property. A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 106 S. Ct. 2561, 2566 (1986); *see also Shelter Creek Development Corp. v. City of Oxnard*, No. 86-6608, slip op. at 1284-89 (9th Cir. Feb. 2, 1988).

We therefore hold that the Lais do not yet have a justiciable claim.

REVERSED, with orders to VACATE the judgment and dismiss the complaint without prejudice.